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# In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN MINCIELI,
Petitioner,

–against–

AUDREY BRUDER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

NATHAN Z. DERSHOWITZ
Dershowitz & Eiger, P.C.
350 Fifth Avenue, Suite 7912
New York, NY 10118
(212) 967-0667
COUNSEL OF RECORD

Victoria B. Eiger
*Of Counsel*

Attorneys for Petitioner
JOHN MINCIELI

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## QUESTIONS PRESENTED FOR REVIEW

I. When the defense of qualified immunity -- the reasonableness of the officer's conduct -- is raised for the first time at trial; evidence, including expert testimony, is presented to the jury on the question of the officer's conduct and its reasonableness; and the jury is instructed as to the principles of qualified immunity and finds for the plaintiff; is it proper for the district court to thereafter grant judgment to the defendant, determining the question of qualified immunity as a matter of law.

II. In a § 1983 action based on an arrest without probable cause does qualified immunity protect a public official where the law establishing the existence of the defendant's constitutional right was clear when the public official acted but became less settled because of cases decided only after the conduct had occurred.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . . i

TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . iii

OPINIONS BELOW . . . . . 1

JURISDICTION OF THIS COURT . . . . . 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED . . . . . 1

STATEMENT OF THE CASE . . . . . 6

REASONS FOR GRANTING THE WRIT . . . . 14

CONCLUSION . . . . . 25

APPENDIX

PER CURIAM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AFFIRMING THE DISTRICT COURT'S ORDER . . . . . App-1

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT GRANTING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW . . . . . App-2

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING REHEARING/REHEARING EN BANC . . . . . App-17

## TABLE OF AUTHORITIES

### CASES


Anderson v. Creighton,
483 U.S. 635 (1987) . . . . . passim

Behrens v. Pelletier,
116 S. Ct. 834 (1996) . . . . . 15

Bryant v. United States Treasury Department,
957 F.2d 729 (9th Cir. 1992) . . . . 19

Butz v. Economou,
438 U.S. 478 (1978) . . . . . 22

City of St. Petersburg Beach v. Jewell,
489 So. 2d 78
(Fla. 2d DCA 1986) . . . . . 23

City of Sweetwater v. Zaldivar,
559 So. 2d 660
(Fla. 3d DCA 1990) . . . . . 23

Harlow v. Fitzgerald,
457 U.S. 800 (1982) . . 15, 16, 18, 22

Hunter v. Bryant,
502 U.S. 224 (1991) . . . . . 15, 19

Jones v. City of Chicago,
856 F.2d 985 (7th Cir. 1988) . . . . 22

Malley v. Briggs,
475 U.S. 335 (1986) . . 13, 15, 17, 19

Mitchell v. Forsyth,
472 U.S. 511 (1985) . . . . . 15

Pierson v. Ray,
386 U.S. 547 (1967) . . . . . 16

Sinaloa Lake Owners Association v. City of Simi Valley, 70 F.3d 1095 (9th Cir. 1995) . . . . 21

Sloman v. Tadlock, 21 F.3d 1462 (9th Cir. 1994) . . . . 21

State v. Copher, 395 So. 2d 635 (Fla. 2d DCA 1981) . . . . . 23

State v. James, 543 So. 2d 288 (Fla. 3d DCA 1989) . . . . . 23

United States v. Gaudin, 115 S. Ct. 2310 (1995) . . . . . 21

United States v. Leon, 468 U.S. 897 (1984) . . . . . 18

United States v. Saunders, 476 F.2d 5 (5th Cir. 1973) . . . . . 13

**CONSTITUTION AND OTHER STATUTES**

28 U.S.C. § 1254 . . . . . 1

42 U.S.C. § 1983 . . . . . 2

Fla. Stat. Ann.
§ 117.09 (West 1982) . . . . . 2, 24

§ 319.33 (West 1989) . . . . . 3, 23

§ 812.014 (West 1994) . . . . . 5

§ 812.019(1) (West 1994) . . . . . 6

U.S. Const., Amendment 4 . . . . . 1

**MISCELLANEOUS**

Henk J. Brands, Allocation of Decision-Making Functions Between Judge and Jury, 90 Colum. L. Rev. 1045 (1990) . . . 15, 21

Kit Kinports, Qualified Immunity in Section 1983 Cases: The Unanswered Questions, 23 Ga. L. Rev. 597 (1989) . . . . . 24

## OPINIONS BELOW

The affirmance by the Court of Appeals for the Eleventh Circuit is noted at 73 F.3d 1107 (11th Cir. 1995); its unpublished per curiam opinion is set forth in the appendix at App-1. The opinion of the United States District Court for the Southern District of Florida is reported at 914 F. Supp. 512 (S.D. Fla. 1994), and is reproduced in the appendix at App-2.

## JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 22, 1995. A timely petition for rehearing en banc, which the Court of Appeals treated as a petition for rehearing and for rehearing en banc, was denied by order entered March 7, 1996. On motion for an extension of time, Justice Kennedy extended Petitioner's time to file his petition for a writ of certiorari to and including June 19, 1996. This Court has jurisdiction to review the Court of Appeals' judgment pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The U.S. Const. Amendment 4 provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fla. Stat. Ann. § 117.09 (West 1982) provides that:

> **Penalties**
>
> (1) Every notary public in the state shall require reasonable proof of the identity of the person whose

signature is being notarized and such person must be in the presence of the notary public at the time the signature is notarized. Any notary public violating the above provision shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. It shall be no defense under this section that the notary public acted without intent to defraud.

(2) Any notary public in this state who shall falsely or fraudulently take any acknowledgement of any instrument as a notary public or who falsely or fraudulently makes any certificate as a notary public or who falsely takes or receives an acknowledgement of the signature on any written instrument shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. Ann. § 319.33 (West 1989) provides that:

**Offenses involving vehicle identification numbers, applications, certificates, papers; penalty**

(1) It is unlawful:
(a) To alter or forge any

certificate of title to a motor vehicle or mobile home or any assignment thereof or any cancellation of any lien on a motor vehicle or mobile home.
(b) To retain or use such certificate, assignment, or cancellation knowing that it has been altered or forged.
(c) To procure or attempt to procure a certificate of title to a motor vehicle or mobile home, or pass or attempt to pass a certificate of title or any assignment thereof to a motor vehicle or mobile home, knowing or having reason to believe that such motor vehicle or mobile home has been stolen.
(d) To possess, sell or offer for sale, conceal, or dispose of in this state a motor vehicle or mobile home, or major component part thereof, on which the motor number or vehicle identification number has been destroyed, removed, covered, altered, or defaced, with knowledge of such destruction, removal, covering, alteration, or defacement, except as provide in s. 319.30(3).
(e) To use a false or fictitious name, give a false or fictitious address, or make any false statement in any application or affidavit required under the provisions of this chapter or in a bill of sale or sworn statement of ownership or otherwise commit a fraud in any application....

Fla. Stat. Ann. § 812.014 (West 1994) provides that:

> **Theft**
>
> (1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to the property or a benefit therefrom.
> (b) Appropriate the property to his own use or to the use of any person not entitled thereto.
> (2)(a) If the property stolen is valued at $100,000 or more, the offender is guilty of grand theft in the first degree, punishable as a felony of the first degree, as provided in s. 775.082, s. 775.083, or s. 775.084.
> (b) If the property stolen is valued at $20,000 or more, but less than $100,000, the offender commits grand theft in the second degree, punishable as a felony of the second degree, as provided in s. 775.082, s. 775.083, or s. 775.084.
> (c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:
> 1. Valued at $300 or more, but less than $20,000.
> 2. A will, codicil, or other testamentary instrument.
> 3. A firearm.
> 4. A motor vehicle....

Fla. Stat. Ann. § 812.019(1) (West 1994) provides that:

> (1) Any person who traffics in, or endeavors to traffic in, property that he knows or should know was stolen be guilty of a felony of the second degree, punishable as provided in ss. 775.082, 775.083, and 775.084.

## STATEMENT OF THE CASE

In August 1988, John Mincieli, the owner of a successful auto-towing and body shop business in the City of Sunrise, Florida, sought the assistance of the police to investigate the burglary and vandalism of several automobiles on his premises, including a 1986 Subaru. This proved to be a huge mistake. The officer who came to investigate ultimately arrested him for auto theft and dealing in stolen property, without probable cause and, thus in violation of his constitutional rights. As a result of this constitutional violation, Mincieli lost his business. He won redress -- but only briefly -- in the United States District Court when the jury awarded him two million dollars in damages. A week later the district court took the victory away, finding, notwithstanding the jury's contrary determination, that the defendant was entitled to qualified immunity and, specifically, that uncertainty in the law regarding the intent element of a technical offense with which Mincieli was also charged shielded the defendant from liability for unlawfully arresting him on far more serious and damaging charges of auto theft and dealing in stolen property. (App-2) The Court of Appeals affirmed in a one line decision. (App-1)

The pertinent facts are as follows:

On August 25, 1988, Sunrise police officer Audrey Bruder, responded to Mincieli's place of business, to investigate vandalism he reported on his premises. (R. 120) Bruder requested that Mincieli provide certain ownership information about the involved vehicles, including a 1986 Subaru, and she returned for this information a few days later. (R. 121) On August 29, Mincieli showed Bruder a Certificate of Title to the Subaru, which showed Judie Minkoff as the owner. Her unnotarized signature appeared in the Transfer of Title section of the Certificate of Title. (R. 144) Mincieli explained to Bruder that he had acquired ownership of the Subaru by operation of Florida's towing lien law and/or by virtue of a trade-in by Minkoff for another vehicle, a VW Rabbit. On August 31, Mincieli advised Bruder that he had sold the Subaru to a friend and neighbor, Daniel Kaplan, and that he, Mincieli, no longer had the Certificate of Title. Bruder thereafter obtained the file on the Subaru from the State Division of Motor Vehicles, which contained the Certificate of Title. The Certificate of Title on file showed a transfer of title from Minkoff to Daniel Kaplan, notarized by Mincieli and dated August 26, 1988 by him. (R. 145)[1]

Bruder, in the course of her investigation, spoke to Judie Minkoff, who claimed that her car had been towed to

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[1] Mincieli testified at trial that he used the August 26 date to coincide with the date of a check written by his neighbor, Daniel Kaplan, to whom the Subaru had been sold. (R. 145-46)

Mincieli's yard on December 26, 1987, following an accident; that she thereafter authorized Mincieli to make repairs (R. 233); that when she went to pick up the vehicle, Mincieli claimed a lien on it; and that she had never transferred title to him, but had signed the title back in 1986, at a time when she thought she was going to transfer the car to her husband. (R. 238-39) She denied signing the title in front of Mincieli or Mincieli's employee, Lenny Sendik.[2] (R. 239) Minkoff, whose criminal past Bruder should have, but neglected to, ascertain[3] was not a reliable informant and her story was incomplete and false. Not only had Mincieli acquired title to the Subaru under the state lien law, but Minkoff had also engaged in a transaction with Mincieli under which she had received another vehicle from Mincieli -- a VW Rabbit -- for $500 cash and the trade-in of the subject Subaru. (R. 134-36) Indeed, the bill of sale for this transaction had been provided to Bruder. (R. 208) There was evidence that Bruder knew that Minkoff was unhappy about the VW Rabbit she had acquired from Mincieli; and that she had made a written complaint to the County Department of Consumer Affairs, seeking a refund of the purchase price or satisfactory repair of that vehicle. (R. 391-92) Mincieli testified that, prior to her application for an arrest warrant, he had made available to Bruder Minkoff's complaint to Consumer Affairs, as well as

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[2] It was undisputed that Bruder never interviewed Sendik.

[3] Inquiry would have shown that Minkoff was on probation for crimes of moral turpitude, credit card fraud, and cocaine problems. (R. 215-17)

documentation regarding his foreclosure of the lien on the Subaru pursuant to Florida law, though the evidence adduced at trial on these matters was conflicting.

Bruder ultimately obtained a warrant for the arrest, and effected the arrest, of Mincieli on four charges. Two of the charges involved crimes of moral turpitude -- grand theft of the Subaru, and dealing in stolen property. The other two charges, also felonies under state law, involved technical offenses: a notary public violation by false acknowledgement, and a false application for a motor vehicle title. (R. 204) Bruder submitted an affidavit in support of the arrest warrant that, among other things, made no reference to the information she had demonstrating Mincieli's ownership of the Subaru by virtue of the towing lien law and or the trade-in deal with Minkoff, and that also failed to make reference to Minkoff's consumer complaint against Mincieli which conceded Mincieli's ownership of the Subaru pursuant to the trade-in deal. (R. 212)

At trial, Mincieli sought to prove that the arrest warrant was obtained, and the arrest was made, without probable cause and that no reasonable officer could have believed that there was probable cause for Mincieli's arrest. He presented expert testimony of Edward Patten, the former Chief of Police of Sunrise, who testified that no reasonably competent police officer would have requested a warrant for Mincieli's arrest on any of the four charges, and he explained, in detail, his reasons. (R. 388) As to auto theft and dealing in stolen property, Patten testified that Bruder was aware that there was a bill of sale showing a trade in on the vehicle (R. 389); she had facts

indicating the existence of a Florida lien (R. 389); she never interviewed Mincieli's manager, Sendik, who, according to both Minkoff and Mincieli, was involved in the transaction (R. 389); she never asked Minkoff about, or otherwise investigated, Minkoff's criminal past (R. 389); she never inquired about the outcome of the Consumer Affairs complaint, which would have demonstrated that Mincieli was investigated and cleared (R. 391-92); never considered Mincieli's long-standing business relationship with the City of Sunrise and its police department; and failed to consider that one who has stolen a vehicle is unlikely to call the police to complain of vandalism to the vehicle or to dispose of it by selling it to a neighbor.

Patten was equally clear that no reasonable officer would have believed there was probable cause to arrest Mincieli for the technical violations. (R. 410-11) According to Patten, there was no basis to charge him with title fraud, because it was Kaplan, not Mincieli, who made application for title. (R. 404) Likewise no reasonable officer would have found probable cause for the notary violation because the law does not require that the notary notarize a signature immediately, and, indeed, under Florida law and the instructions contained on the transfer of title form itself, title is not to be notarized until the transaction is complete. (R. 390-91)[4]

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[4] The section of the form in which Mincieli's notarization appears states:

> ATTN: No notary public shall notarize a title transfer unless the name of the buyer, selling

At the close of the plaintiff's case in chief, defendant moved for judgment as a matter of law, pursuant to F.R.C.P. 50(a), which was denied. (R. 434) The motion was renewed and again denied on the claim of unlawful arrest at the close of all of the evidence. (R. 453)

The case was submitted to the jury under instructions which directed the jury to determine whether plaintiff proved his claim that he was arrested without probable clause. The jury was further charged that, if it found that Mincieli was arrested without probable cause, the jury should then consider Bruder's defense of qualified immunity. (R. 559)

The court instructed the jury that it should find for the defendant if the officer reasonably but mistakenly concluded that probable cause was present. (R. 560) The defendant objected to giving the question of qualified immunity to the jury, arguing that it was a question of law for the court, but the objection was overruled. (R. 481-82, 484) The defendant did not object to the language of the charge that was given. (R. 485)

The jury returned a verdict for the plaintiff, and awarded $1,700,000 in compensatory damages, and $300,000 in punitive damages. (R. 573)

Following the verdict, the defendant renewed her motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), asserting that she was entitled to judgment

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price and odometer reading are entered in the designated places [on the Transfer of Title form].

because probable cause existed for the arrest, as a matter of law, for the charges related to the Subaru's certificate of title, that is, the notary public violation by false acknowledgement and the fraudulent transfer of a motor vehicle title.[5] She also argued that, as a matter of law, Bruder was entitled to qualified immunity.

By opinion and order dated March 7, 1994, the district court granted the motion and entered judgment for the defendant. The district court rejected Bruder's claim that as a matter of law there was probable cause for the technical, title-related offenses, finding that "a reasonable jury could have concluded that the facts and circumstances within Bruder's knowledge would not have led a prudent officer to believe that Mincieli had committed the title-related offenses." (App-8)

The court, however, determined that defendant was entitled to judgment based on the doctrine of qualified immunity. The court first stated the question to be "whether Bruder had 'arguable probable cause' or whether 'reasonable officers in the same circumstances and possessing the same knowledge as [Bruder] could have believed that probable cause existed'." (App-11) However, narrowing the inquiry, the trial court further defined the question to be whether "Bruder's probable cause affidavit ... is so lacking in indicia [of probable cause] as to render Bruder's belief in the existence of

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[5] She did not argue that there was probable cause as a matter of law for the charges of motor vehicle theft and dealing in stolen property.

probable cause unreasonable." (App-12) The trial court determined that, because the precedents were conflicting as to whether an intent to defraud is a necessary element of the offense of fraudulent transfer of a motor vehicle title, Bruder had "arguable probable cause to believe that Mincieli had violated that statute." (App-14) Finally, citing United States v. Saunders, 476 F.2d 5, 7 (5th Cir. 1973), the court concluded, "Because she had arguable probable cause for at least one of the four charges included in the probable cause affidavit, Bruder's shield of immunity is not lost." (App-15)

Mincieli appealed. In the Court of Appeals for the Eleventh Circuit, he argued that the issue of qualified immunity (which had not been the subject of a motion to dismiss or a motion for summary judgment)[6] had been properly given to the jury which had properly decided that question in favor of the plaintiff. He argued, inter alia, that there was unrebutted expert testimony, given in strict accord with Malley v. Briggs, 475 U.S. 335 (1986), that a reasonably well-trained police officer in Bruder's position would have known that the probable cause affidavit not only lacked indicia of probable cause, but misstated, distorted, and omitted material facts, rendering official belief in the existence of probable cause unreasonable.[7]

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[6] At one point in the proceedings, the defendant sought a continuance to make a summary judgment motion; however, no such motion was ever made.

[7] Finally, he argued that, even if there were arguable probable cause to arrest for the technical, title-related

The Court of Appeals affirmed in a one-line decision that stated: "We agree with the district court that appellee Bruder was protected by qualified immunity." (App-1)

In his petition for rehearing/suggestion for rehearing in banc, Mincieli sought further appellate consideration urging that the qualified immunity issue was properly decided by the jury, and that the jury was the proper arbiter of the claim where, as here the qualified immunity defense was raised, not at an early, pre-trial stage of the proceedings, but at the trial itself. The petition for rehearing/rehearing en banc was denied by order dated March 7, 1996.

## REASONS FOR GRANTING THE WRIT

### I.

In recent years, this Court has rendered a series of decisions addressing the scope and nature of the defense of qualified immunity in actions to redress violations of constitutional rights; the courts' role in the determination of qualified immunity; and the appropriate procedural vehicles for raising and deciding the question; as well as the

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offenses, his § 1983 damages arose from his arrest on the more serious stolen property charges, and thus his 1983 claim survived. He argued: "One may not be arrested for treason without probable cause yet deprived [of a remedy] because he also was seen to have spit on the sidewalk." Brief for Appellant at 16, Mincieli v. Bruder, 73 F.3d 1107 (11th Cir. 1995).

immediate appealability of pretrial orders denying qualified immunity. See, e.g., Behrens v. Pelletier, 116 S. Ct. 834 (1996); Hunter v. Bryant, 502 U.S. 224 (1991); Anderson v. Creighton, 483 U.S. 635 (1987); Malley v. Briggs, 475 U.S. 335 (1986); Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800 (1982). While these cases stand for a number of legal principles, virtually all of them operate to limit the number of cases that will ever go to a jury for determination. Indeed, disposing of cases at an early stage and without the need for a jury trial has been an express rationale for several of the qualified immunity decisions of this Court. See Hunter v. Bryant, 502 U.S. at 226; Anderson v. Creighton, 483 U.S. 635 (1987); Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. at 808. The cases have, however, left unclear the allocation of decision-making functions between judge and jury in the qualified immunity context, in cases that have gone to trial, a question with which the courts continue to struggle. See generally, Henk J. Brands, Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury, 90 Colum. L. Rev. 1045 (1990).

This case did go to the jury and Petitioner submits, properly so. The jury, having heard conflicting evidence as to what the police officer knew and should have known, and did and did not do in the course of her investigation and having been instructed on the defense of qualified immunity, rejected the defense. The district court, on the defendant's motion, only then decided the qualified immunity question in the defendant's favor as a matter of law, and, without explanation or elaboration, the Court of Appeals affirmed.

Petitioner submits that the district court's decision and the court of appeals affirmation reflect a serious misunderstanding of the application of qualified immunity in unconstitutional arrest cases and the proper role of the judge and jury where facts concerning the defendant's conduct are in dispute and the qualified immunity question is raised at trial, and not before.

In Pierson v. Ray, 386 U.S. 547 (1967), this Court established a good faith defense for public officials, holding that police officers who had arrested black ministers in a "whites only" area of a train station were immune from damages under Section 1983 so long as they "reasonably believed in good faith that the arrest was constitutional," even if "the arrest was in fact unconstitutional." Id. at 557. The standard contained an objective component -- reasonable belief -- as well as a subjective element -- good faith.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court abandoned the subjective prong of the qualified immunity test, adopting a qualified immunity standard that shielded government officials performing discretionary functions from liability for civil damages so long as their conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. If the right violated by an official was found to be not clearly established at the time of the official's action, the official would be shielded from liability even if a court determined that a violation of constitutional rights had occurred, and even if the official knew that his conduct violated the plaintiff's

rights. Id. at 818-19.

Precisely how well defined a right had to be in order to be considered "clearly established" was addressed in Anderson v. Creighton, 483 U.S. 635 (1987). In that case, plaintiffs alleged that agents of the FBI had conducted an unlawful warrantless search of their home. The Court of Appeals had held that defendants were not entitled to qualified immunity because the Fourth Amendment right to be free from warrantless searches of one's home unless the searching officer had probable cause and there were exigent circumstances was clearly established. Id. at 638. In an opinion by Justice Scalia, the Court reversed, stating that application of the clearly established law test at this level of generality rendered the qualified immunity defense meaningless. Id. at 639. The right alleged to have been violated should be "'clearly established' in a more particularized, and hence more relevant sense." Id. at 640. Although the Court would not require that the precise conduct complained of had been previously held unlawful, it stated that "in the light of pre-existing law the unlawfulness must be apparent." Id. The Court defined the qualified immunity inquiry, in that warrantless search case, as "the objective (albeit fact-specific) question whether a reasonable officer could have believed [defendant]'s warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." Id. at 641.

This formulation had, perhaps, been foreshadowed in Malley v. Briggs, 475 U.S. 335 (1986), where the Court held that a police officer was entitled only to qualified immunity, not absolute immunity,

where it was charged he had caused plaintiff to be unconstitutionally arrested by presenting a magistrate with a complaint and supporting affidavit which failed to establish probable cause. Id. at 340-44. The Court held that an officer loses the "shield of immunity" "where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." Id. at 344-45. The Court rejected the argument that the magistrate's finding of probable cause and issuance of the warrant rendered the act of applying for a warrant per se objectively reasonable, provided the officer believed that the facts alleged in his affidavit were true, finding it at odds with the concept of "objective reasonableness" developed in Harlow and United States v. Leon, 468 U.S. 897 (1984). Malley, 475 U.S. at 345. The question for decision was thus "whether a reasonably well-trained officer in [defendant's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." Id. "If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest." Id.

Considered in conjunction with Anderson v. Creighton, then, whether a police officer is entitled to qualified immunity depends upon whether a reasonably well-trained officer would have known that her affidavit failed to establish probable cause, under clearly settled law, and thus that the application for the warrant violated a clearly established Fourth Amendment right of the plaintiff to be free from an arrest in the absence of probable cause to believe that he had committed the

crimes charged.

Five years after Malley v. Briggs, in Hunter v. Bryant, 502 U.S. 224 (1991), this Court reiterated the qualified immunity standard in a case involving an arrest, holding that the doctrine shielded Secret Service Agents who had made a warrantless arrest of an individual for threatening the president if "a reasonable officer could have believed [Bryant's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." Id. at 227, citing Anderson v. Creighton, 483 U.S. at 641. The Court held that "law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." Id. The Hunter Court "stressed the importance of resolving immunity questions at the earliest possible stage in litigation," and disapproved the Ninth Circuit's ruling upholding a denial of summary judgment on qualified immunity grounds. Hunter, 502 U.S. at 227-28. The Court held that the question was "whether the agents acted reasonably under settled law in the circumstances," id. at 228, and remanded the case for further proceedings. On remand, the Ninth Circuit reversed the district court's denial of summary judgment, and remanded to the district court for dismissal, Bryant v. United States Treasury Department, 957 F. 2d 729 (9th Cir. 1992), apparently on the basis of Hunter's directive that "immunity should be decided by the court" and should not "routinely [be sent to] the jury." Hunter, 502 U.S. at 228.

Petitioner submits that, Hunter notwithstanding, in some cases, the question of qualified immunity can only be decided by the jury and, where a case has

gone to trial, Petitioner submits, the question should routinely [be decided by] the jury. Id.

The determinative question for qualified immunity purposes is whether Bruder acted reasonably in light of clearly settled law; that is, whether a reasonable law enforcement officer, possessing the same knowledge and in the same circumstances as she, could have believed that arguable probable cause existed for plaintiff's arrest, in light of clearly established law. Reasonableness is a quintessential jury question appropriate for resolution by the jury. To be sure, the case law that has developed operates in favor of early determination of the qualified immunity question and, in order to have an early determination, seems often to place that question in the hands of the court. However, it is policy considerations, not logic, that mandate that result.

Where, as here, the case has been tried to a jury, the opportunity to have an early, pretrial determination of the issue, has already been lost. There is no compelling reason why a properly instructed jury should not decide the qualified immunity question. If it is appropriate for the jury to decide whether there was actual probable cause for petitioner's arrest, it is surely appropriate for the jury to determine whether a reasonable officer could have reasonably believed that there was probable cause for that arrest.

> [T]here is no reason to think that allowing the jury rather than the judge to determine whether an officer's conduct was reasonable under the

> circumstances would be inimicable to the policies that animate immunity. On the contrary, evaluating the reasonableness of human conduct is undeniable within the core area of jury competence.

Sloman v. Tadlock, 21 F.3d 1462, 1468 (9th Cir. 1994). "[T]he jury is best suited to determine the reasonableness of an officer's conduct in light of the factual context in which it takes place." Id.; see also Sinaloa Lake Owners Association v. City of Simi Valley, 70 F.3d 1095, 1099 (9th Cir. 1995) ("whether a reasonable state official could have believed the action taken was lawful is a mixed question of law or fact.... If there are genuine issues of material fact in issue relating to the historical facts of what the official knew or what he did, it is clear that there are questions of fact for the jury to determining"); see generally, Henk J. Brands, Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury, 90 Colum. L. Rev. 1045 (1990).

This Court's recent decision in United States v. Gaudin, 115 S. Ct. 2310, 2314-15 (1995), establishes that, in our legal system, it is the jury, not the court, that should decide mixed questions of law and fact. Though Gaudin was a criminal, and not a civil, case, the same principle applies.[8]

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[8] Arguably, permitting the court to decide such questions violates the civil plaintiff's Seventh Amendment right to a jury trial on his claims.

In attempting to comply with this Court's directives that the qualified immunity defense should generally be decided as early as possible, and, generally, by the court, the district court and the court of appeals have gone too far. And they are not the only courts that have done so. Some courts have held that the court should always decide the question of immunity. See, e.g., Jones v. City of Chicago, 856 F.2d 985, 995 (7th Cir. 1988) ("when facts pertinent [to the qualified immunity question] are in dispute ... our most recent and only en banc decision on the question states that the judge should always decide the issue of immunity"). The balance struck between affording citizens a "realistic avenue for vindication of constitutional guarantees," Harlow, 457 U.S. at 814, citing, Butz v. Economou, 438 U.S. 478, 506 (1978), and minimizing the societal costs of exposing public officials to "the expenses of litigation, the diversion of official energy from pressing public issues, ... the deterrence of able citizens from acceptance of public office" ... and "dampen[ing] the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties," is out of kilter, and warrants reexamination. Harlow, 457 U.S. at 814. In the case at bar, the jury properly determined whether the defendant violated the defendant's constitutional rights, and whether she was nevertheless immune from suit because her action, while unconstitutional, was reasonable. The courts' rejection of that jury verdict, in favor of a "legal" determination of the qualified immunity question, was improper.

## II.

Assuming arguendo that it was appropriate for the court to determine the question of qualified immunity as a matter of law, the resolution of that issue was nevertheless inconsistent with controlling decisions of the Court, and therefore merits review on certiorari.

Petitioner had argued, with respect to the two technical offenses, that there was no evidence whatsoever of any intent to defraud on his part, and thus there was not even arguable probable cause to arrest him for those offenses. He cited two state court decisions that clearly held that intent to defraud was a necessary element of the offense proscribed in Section 319.33(e), the provision regarding fraudulent transfer of a motor vehicle title -- City of St. Petersburg Beach v. Jewell, 489 So. 2d 78, 79 (Fla. 2d DCA 1986), and State v. Copher, 395 So. 2d 635, 638 (Fla. 2d DCA 1981). Bruder, for her part, did not argue that she had, or that her affidavit contained, any indication that Mincieli possessed criminal intent. Rather, she cited two cases that held that specific intent or intent to defraud was not a necessary element of the § 319.33 offense -- City of Sweetwater v. Zaldivar, 559 So. 2d 660, 661 (Fla. 3d DCA 1990) (intent to defraud not necessary); and State v. James, 543 So. 2d 288, 289 (Fla. 3d DCA 1989) (same), urging that there was no settled law on the subject. Both of the cases cited by Bruder, however, were decided after the arrest had taken place, and thus could not possibly have provided arguable legal justification for the seeking of the arrest warrant in this case. Regardless of later developments in the

law, at the time of the conduct at issue, the law was clear and well-settled that the fraudulent transfer offense for which Bruder sought an arrest warrant required an intent to defraud. Mincieli's arrest without any facts tending to show that he had such intent was thus in violation of a well-established constitutional right.[9] See generally, Kit Kinports, Qualified Immunity in Section 1983 Cases: The Unanswered Questions, 23 Ga. L. Rev. 597, 605-06 (1989). Because the district court plainly erred in determining that the law was "unsettled" based on law that did not exist at the time of the defendant's unconstitutional conduct, the recognition of qualified immunity was inappropriate in this case and in contravention of this Court's clear mandate that qualified immunity does not shield an official where he violates a clearly established constitutional right.

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[9] The district court also said that there was arguable probable cause to arrest Mincieli for the other technical offense, the notary public violation by false acknowledgement, § 117.09(2). In contrast to the misdemeanor provision of § 117.09(1), the felony provision, § 117.09(2), plainly requires a specific intent to defraud. The courts below did not hold otherwise, or suggest that the law on the subject was unsettled or unclear.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
350 Fifth Avenue, Suite 7912
New York, NY 10118
(212) 967-0667
COUNSEL OF RECORD

Victoria B. Eiger
Of Counsel

# APPENDIX

[DO NOT PUBLISH]
Filed
U.S. Court of Appeals
Eleventh Circuit
Dec. 22 1995
Miguel J. Cortez
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 94-4329

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D.C. Docket No. 91-6455-CIV-SH

JOHN MINCIELI,

Plaintiff-Appellant,

versus

AUDREY BRUDER,

Defendant-Appellee.

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Appeal from the United States
District Court for the
Southern District of Florida

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(December 22, 1995)

Before KRAVITCH, ANDERSON and BARKETT, Circuit Judges.

PER CURIAM:

We agree with the district court that appellee Bruder was protected by qualified immunity.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-6455-CIV-HIGHSMITH

Filed by [initial]
Mar 7 1994
T. G. Cheleotis
Clerk U.S. Dist. Ct.
S.D. of Fla.-Miami

JOHN MINCIELI,

Plaintiff,

vs.

AUDREY BRUDER,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

THIS CAUSE came before the Court upon Defendant Audrey Bruder's renewed motion for judgment as a matter of law and/or motion for judgment notwithstanding verdict, pursuant to Fed. R. Civ. P. 50. Preliminarily, the Court notes that the 1991 revisions to the Federal Rules of Civil Procedure abolished the terms "directed verdict" and "judgment notwithstanding verdict," in favor of the all inclusive term "judgment as a matter of law." Fed. R. Civ. P. 50 advisory committee's note. Therefore, the Court denies as moot the defendant's alternative motion for judgment notwithstanding verdict. For the reasons stated below, however, the Court grants the defendant's motion for judgment as a matter of law.

## PROCEDURAL BACKGROUND

Plaintiff John Mincieli brought this action for violation of his constitutional rights, pursuant to 42 U.S.C. § 1983, as a result of his arrest by Defendant Audrey Bruder, a police officer with the City of Sunrise. In his complaint, Mincieli alleged that Bruder arrested him without probable cause and performed an unreasonable search and seizure of his premises and property. Mincieli sought general, special and punitive damages under 2 U.S.C. § 1983 and attorney's fees and court costs under 42 U.S.C. § 1988. As part of her answer, Bruder asserted that she was entitled to qualified or good faith immunity from liability under 42 U.S.C. § 1983. Bruder, however, did not seek a ruling on this issue prior to trial.[1]

The action came before the Court and a jury for trial. At the close of the plaintiff's case in chief, and again at the close of all the evidence, Bruder moved for judgment as a matter of law, pursuant to Fed.R.Civ.P. 50(a). The Court denied both motions as to Mincieli's claim that Bruder arrested him without probable cause. The Court, however, granted the motion at the close of all the evidence as to Mincieli's claim that Bruder performed an unreasonable search and seizure of his premises and property. The jury returned a verdict for Mincieli. In the verdict form, the jury answered the special interrogatory submitted by the Court as follows:

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[1]At one point in the proceedings, Bruder sought and obtained a trial continuance for the purpose of filing a summary judgment motion, but she never filed such a motion.

Interrogatory #1: "Do you find from a preponderance of the evidence that the defendant violated plaintiff's constitutional rights by arresting him without probable cause, under the circumstances described by the Court in its instructions?"

Answer: "Yes."

The jury then awarded Mincieli special, monetary and/or economic damages in the amount of $1,000,000 and punitive damages in the amount of $300,000.

In accordance with Fed. R. Civ. P. 50(b), Bruder renewed her motion for judgment as a matter of law after trial.[2] Bruder argues that she is entitled to judgment as a matter of law because: (1) probable cause existed for Mincieli's arrest as a matter of law; and (2) Bruder is entitled to qualified immunity from liability under 42 U.S.C. § 1983.

STANDARD OF REVIEW

In reviewing a motion for judgment as a matter of law, the Court must

> consider all of the evidence--not just the evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court

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[2]In her motion, Bruder did not join a motion for new trial under Rule 59, as permitted by Rule 50(b).

> believes that reasonable men could not arrive at a contrary verdict, granting of the [motion] is proper. On the other hand, if there is substantial evidence opposed to the [motion], that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the [motion] should be denied.

Von Stein v. Brescher, 904 F.2d 572, 579 (11th Cir. 1990) (quoting Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

THE EVIDENCE PRESENTED AT TRIAL

At the time of his arrest, Mincieli owned a car-towing business located within the City of Sunrise. Officer Bruder first came to Mincieli's towing yard in August 1988 to investigate Mincieli's complaint that some of the cars in his yard had been burglarized and vandalized. A 1986 Subaru registered to Judie Rochelle Minkoff was one of the cars included in the report. Over the next several months, Bruder investigated the ownership status of the Subaru. As a result of such investigation, Bruder filed a probable cause affidavit and supporting documentation with the state attorney's office, which resulted in the issuance of a capias for Mincieli's arrest. Pursuant to the capias, Bruder arrested Mincieli in May 1989 for the following crimes: third degree felony of motor vehicle theft; second degree felony of dealing in stolen property; third degree felony of notary public violation by false acknowledgment; and third degree felony of fraudulent transfer of a motor vehicle

title. Although Mincieli was prosecuted for two of these charges; namely, motor vehicle theft and dealing in stolen property, the prosecution ended in dismissal.

Mincieli, a notary public in the State of Florida, testified that the owner of the Subaru, Judie Minkoff, had signed the transfer of title section on the back of the Subaru's certificate of title in his presence but that he had not notarized the signature at that time. When Bruder visited Mincieli's yard on August 29, 1988, Mincieli showed her the certificate of title, bearing Minkoff's unnotarized signature. Afterwards, Mincieli notarized Minkoff's signature, but dated his notarization as of August 26, 1988. He stated that he used this date to coincide with the date on a check written by Daniel Kaplan, who purchased the Subaru from him.

Bruder testified that, upon her review of the Subaru's title record with the Department of Motor Vehicles, she found a completed transfer of title stating that the Subaru had been purchased directly from Minkoff by Kaplan. Minkoff's signature appeared notarized by Mincieli as of August 26, 1988. Bruder, however, had seen the unnotarized certificate on August 29, 1988. Bruder further testified that she presented the results of her investigation to Assistant State Attorney Mark Horn. After consultation with Horn, she prepared a probable cause affidavit enumerating the four felony charges recommended by Horn. Once Horn obtained a capias, she proceeded to arrest Mincieli on May 3, 1989.

Mincieli presented the expert testimony of former City of Sunrise Police Chief Edward Patten. Chief Patten opined

that no reasonably competent officer in Bruder's position would have sought a capias for any of the four felony offenses for which Mincieli was arrested. Bruder did not present any opposing expert testimony.

DISCUSSION

1. The jury's probable cause determination:

Bruder first argues that she had probable cause "as a matter of law" to arrest Mincieli for the two felony charges related to the Subaru's certificate of title; i.e., the notary public violation by false acknowledgment and the fraudulent transfer of a motor vehicle title.[3] Under the previously recited standard of review, however, a better statement of the issue is: Whether, viewing the evidence in the light most favorable to Mincieli, no reasonable jury could have concluded that Bruder lacked probable cause for Mincieli's arrest for these violations? Bruder would have the Court answer this question in the affirmative by relying on Mincieli's testimony that he back-dated the notarization of Minkoff's signature and Mincieli's acknowledgment that the Subaru transaction that actually took place was from Minkoff to Mincieli to Kaplan, even though the certificate showed a direct transfer from Minkoff to Kaplan.

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[3]In her motion, Bruder does not seek a similar finding of probable cause as to the charges of motor vehicle theft and dealing in stolen property. The Court, therefore, accepts the jury's finding of lack of probable cause as to these two charges.

The Court instructed the jury on probable cause as follows:

> In this regard, you are instructed that a law enforcement officer has probable cause to arrest a suspect if the facts and circumstances within the officer's knowledge, of which he or she has reasonable trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense. The existence of probable cause to arrest is based on objective standards.

As to the notary public violation, the Court instructed the jury that this crime requires the false or fraudulent acknowledgment of an instrument. As to the motor vehicle transfer violation, the Court instructed the jury that it is unlawful to make a false statement on a certificate of title application, or to otherwise commit a fraud in any such application.

The Court finds that the evidence, when viewed in the light most favorable to Mincieli, and drawing all inferences in his favor, supports the jury's explicit determination that Bruder lacked probable cause to arrest Mincieli for these violations. Viewing the evidence in such a light, a reasonable jury could have concluded that the facts and circumstances within Bruder's knowledge would not have led a prudent officer to believe that Mincieli had committed the title-related offenses. Specifically, a reasonable jury could have concluded that Mincieli's back-dating of the signature notarization and

his role in the direct transfer of title from Minkoff to Kaplan were insufficient to support a reasonable belief that Mincieli had committed these violations, absent fraudulent intent on the part of Mincieli. Accordingly, the Court rejects Bruder's request for entry of judgment as a matter of law on the basis that no reasonable jury could have concluded that Bruder lacked probable cause for Mincieli's arrest for these violations.[4]

2. Bruder's entitlement to qualified immunity:

Bruder next argues that she is entitled to qualified immunity from liability under 42 U.S.C. § 1983. Again, Bruder misstates the issue to be determined by the Court. "Qualified immunity is an affirmative defense from trial and not a defense to liability issues raised during trial." Ansley v. Heinrich, 925 F.2d 1339, 1348 (11th Cir. 1991).

"[Q]ualified immunity is a legal determination that must be made by the court and may be made either before trial,

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[4]Bruder also argues that the facts within her knowledge supported a finding of probable cause for violation of another provision of the notary statute; namely, the requirement that a signatory must be in the presence of a notary at the time the signature is notarized. Fla. Stat. § 117.09(1) (1987). Bruder did not raise this issue at trial for consideration by the jury. Therefore, Bruder cannot complain that the jury's probable cause determination was unreasonable on this basis.

during trial, or after trial." Stone v. Peacock, 968 F.2d 1163, 1165-66 (11th Cir. 1992). Because Bruder did not raise the defense of qualified immunity by way of a pre-trial motion, the Court did not have the opportunity to address the issue prior to trial. The Court denied Bruder's motion for judgment as a matter of law during trial. Therefore, the Court must address Bruder's qualified immunity defense, as a legal question, post-trial.[5]

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[5]Pursuant to Bruder's request, the Court gave the jury a qualified immunity instruction based on the language contained in the Eleventh Circuit's Federal Claims Pattern Instruction Number 2.1. A review of the case law indicates, however, that the Eleventh Circuit's present posture is "that the defense of qualified immunity should be decided by the court, and should not be submitted for decision by the jury." Stone v. Peacock, 968 F.2d 1163, 1166 (11th Circ. 1992). Moreover, the jury's resolution of factual issues material to the qualified immunity defense, if any, should be accomplished without any mention of qualified immunity. Ansley, 925 F.2d at 1348. Where the jury decides the case on the merits rather than on qualified immunity, however, a court's instructions to the jury on qualified immunity may have no effect. Stone, 968 F.2d at 1166. Because the special interrogatory answered by the jury in this case did not mention qualified immunity and the jury found in favor of the plaintiff, the Court concludes that the jury decided the case on the merits rather than on qualified immunity.

In addressing Bruder's defense of qualified immunity, the Court follows the following two-step analysis developed by the Eleventh Circuit:

(1) Bruder must first prove that she was acting within the scope of her discretionary authority when she arrested Mincieli;

(2) Once Bruder has satisfied the burden of moving forward with the evidence, the burden shifts to Mincieli to show lack of good faith on Bruder's part. Mincieli can meet this burden by demonstrating that Bruder's actions violated clearly established constitutional law. Lowe v. Aldridge, 958 F.2d 1565, 1570 (11th Cir. 1992). Because Mincieli has not challenged the proposition that Bruder was acting within the scope of her discretionary authority as a police officer when she arrested him, the Court concludes that Bruder has satisfied the burden imposed by the first step of the analysis. The Court proceeds, therefore, to determine whether Mincieli has demonstrated that Bruder's actions in filing a probable cause affidavit, which resulted in the issuance of a capias and her subsequent arrest of Mincieli pursuant to the capias, violated clearly established constitutional law.

"Indubitably, an arrest without probable cause violates the Fourth Amendment and establishes a cause of action under section 1983. Lowe, 958 F.2d at 1570. The question that the Court must determine, however, is whether Bruder had "arguable probable cause" or whether "reasonable officers in the same circumstances and possessing the same knowledge as [Bruder] could have believed that probable cause existed." Id. (citing

Von Stein v. Brescher, 904 F.2d 572, 579 (11th Cir. 1990)). "In other words, actual probable cause is not necessary for an arrest to be objectively reasonable." Id. As reflected in this statement, application of the doctrine of qualified immunity to situations involving probable cause determinations has resulted in the development of "a double standard of reasonableness--the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable." Anderson v. Creighton, 483 U.S. 635, 648 (1987) (Stevens, J. dissenting). In Malley v. Briggs, 475 U.S. 335 (1986), the United States Supreme Court made this more generous standard, which had been established for suppression hearings in United States v. Leon, 468 U.S. 897 (1984), applicable to the issue of qualified immunity. Pursuant to Malley, "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost." Malley, 475 U.S. at 344-45 (citing Leon, 468 U.S. at 923). The Court, therefore, must review Bruder's probable cause affidavit to determine if it is so lacking in indicia as to render Bruder's belief in the existence of probable cause unreasonable. The fact that Bruder presented her documentation to Assistant State Attorney Horn, and that Horn obtained a capias based on such documentation does not insulate her from this inquiry.

Malley, 475 U.S. at 345-46.[6]

According to Bruder's unrefuted testimony, when she filed her probable cause affidavit she had knowledge of Minkoff's back-dating of the notarization and of the discrepancy between the recorded "Minkoff-Kaplan" transaction and the actual "Minkoff-Mincieli-Kaplan" transaction. Indeed, Mincieli's testimony confirmed that he back-dated the notarization and that a direct sales transaction from Minkoff to Kaplan did not occur. The Court finds that Bruder's knowledge of the back-dated notarization constitutes sufficient indicia to support a reasonable belief on Bruder's part that Mincieli had committed the third degree felony of notary public violation by false acknowledgment. Similarly, the Court finds that Bruder's knowledge of the discrepancy between the actual sales transaction and the transaction evidenced by the title transfer, constitutes sufficient indicia to support a reasonable belief on Bruder's part that Mincieli had committed the third degree felony of fraudulent transfer of a motor vehicle

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[6]Bruder has conceded, for purposes of this motion, that she had knowledge indicating that Mincieli might have obtained ownership of the Subaru found in his towing yard by virtue of the Florida towing lien law or through a trade-in deal with the Subaru's owner, Judie Minkoff, and that such knowledge would vitiate a finding of probable cause as to the theft-related charges. In light of Bruder's posture, the Court does not consider the issue of arguable probable cause as to the charges of motor vehicle theft and dealing in stolen property.

title.

Mincieli argues that, absent specific fraudulent intent on his part, Bruder lacked even arguable probable cause to arrest him for the title-related violations. Although this consideration may apply to a determination of the existence of actual probable cause, the reasonableness standard for qualified immunity is less exacting. Where "reasonable competent persons could disagree on the interpretation of a statute," qualified immunity protects an arresting officer acting under one such reasonable interpretation. Von Stein, 904 F.2d at 579. In their briefs, the parties have cited conflicting state decisions regarding the requirement of specific intent for the third degree felony of fraudulent transfer of a motor vehicle title. Compare, City of Sweetwater v. Zaldivar, 559 So. 2d 660, 661 (Fla. 3d DCA 1990) (intent to defraud not necessary); State v. James, 543 So. 2d 288, 289 (Fla. 3d DCA 1989) (same), with City of St. Petersburg v. Jewell 489 So. 2d 78, 79 (Fla. 2d DCA 1986) (intent to defraud necessary); State v. Copher, 395 So. 2d 635, 638 (Fla. 2d DCA 1981) (same). The existence of these conflicting interpretations regarding the specific intent requirement for the motor vehicle transfer statute leads the Court to the conclusion that the law in this area was not clearly established at the time of Mincieli's arrest. Therefore, even assuming that Mincieli lacked specific intent to defraud anyone, Bruder had arguable probable cause to believe that Mincieli had violated the statute. Von Stein, 904 F.2d at 579-80 (Arguable probable cause existed where more than one reasonable interpretation of a statute was

possible and the statute had never been subject to judicial interpretation.). Because she had arguable probable cause for at least one of the four charges included in the probable cause affidavit, Bruder's shield of immunity is not lost. United States v. Saunders, 476 F.2d 5, 7 (5th Cir. 1973) ("Where an officer makes an arrest which is properly supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcement of the wrong offense vitiates the arrest.") Accordingly, Bruder is entitled to judgment as a matter of law.

CONCLUSION

Based on the foregoing considerations, it is hereby

ORDERED AND ADJUDGED that Defendant Audrey Bruder's renewed motion for judgment as a matter of law is GRANTED. It is further

ORDERED AND ADJUDGED that Bruder's alternative motion for judgment notwithstanding verdict is DENIED as moot.

Pursuant to Fed.R.Civ.P. 58, the Court shall enter its final judgment by separate order.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 7th day of March, 1994.

SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Arthur M. Wolff, Esq.
Paul McKenna, Esq.
Michael Piper, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 94-4329

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U.S. Court of Appeals
Eleventh Circuit
Mar - 7 1996
Miguel J. Cortez
Clerk

JOHN MINCIELI,

Plaintiff-Appellant,

versus

AUDREY BRUDER,

Defendant-Appellee.

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On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d_____).

Before: KRAVITCH, ANDERSON and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh

Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE